

Employers Beware: Conducting Social Media Searches of Potential Employees May Land Your Company in Hot Water

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As social media sites continue to increase in number, so does the amount of employers who use those sites for background checks as part of their hiring process. On one hand, a background check can be a useful tool to gauge the personality and character of a potential candidate. On the other hand, however, the use of social media sites, such as Facebook, LinkedIn, Twitter, and Google+ do not come without some risk of landing your company in hot water.

How hot you ask? Well, conducting a social media search may lead an employer to discover protected information that if used to deny a candidate's employment application could subject the employer to potential claims of discrimination or negligent hiring. Some of the protected factors include: (1) race, color, national origin, religion, and gender under Title VII of the Civil Rights Act of 1964; and (2) ancestry, pregnancy, disability, sexual orientation (actual or perceived), genetic predisposition or carrier status, arrest or conviction, military status, lawful off-duty activities, genetic information or testing, and marital status under New York law. Since making a hiring decision based on any of these protected categories is illegal, employers who discover this information from a social media search, even if inadvertently, may face a potential lawsuit.

One simple method of avoiding the risk associated with hiring determinations based on information obtained from social media websites is to use a third party to conduct the searches, and ask the third-party company to forward only job-relevant information. In addition to using a third-party, detailed records as to why each candidate was hired or not hired should be maintained to protect against any potential claims.

If your company decides to keep the social media search in-house and not to use a third-party, it is important to remember the following:

- Conduct all social media searches consistently, as only conducting background checks for certain applicants can expose the employer to claims of discrimination or negligent hiring;
- Do not allow the person who is going to make the ultimate hiring decision conduct the social media search, and keep organized documentation of the person who actually does conduct the search; and
- Keep the scope of search limited to only publicly available information. This means that if the person conducting the search needs to take any additional steps to view the candidate's information, such as requesting permission to view private tweets on Twitter or "friending" the candidate on Facebook, then using the information revealed by taking those actions should not be considered.

By following this simple advice when conducting a social media search of a potential employee, your company is less likely to be subject to complaints regarding its hiring determinations.

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